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No. 80-702

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF NEW MEXICO, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF ON BEHALF OF STATE OF CALIFORNIA AS AMICUS CURIAE FOR THE STATE OF NEW MEXICO

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INTEREST OF THE AMICUS CURIAE

California has been faced with suits brought by the United States Attorney General claiming tax immunity as "agents" of the United States for various private contractors doing business with the Department of Defense and

other federal agencies arising solely from "magic words" in departmental regulations or other acts which appear to have no function or purpose other than to obtain immunity from state taxation. California believes this is contrary to the intention of this Court as well as that of Congress and the stated policy of Department of Defense. California requests that the Supreme Court by its opinion in this case clearly restrict tax immunity of independent contractors doing business with the United States to those rare circumstances where the need is clear for use by the United States of an independent contractor as its agent for purposes other than tax immunity and the true substance of the transaction as that in which the United States takes full and open responsibility as principal.

California joins in and will not here duplicate the Briefs of New Mexico and the other Amicus Curiae supporting it.

ARGUMENT

THE ATTORNEY GENERAL OF THE UNITED STATES IS ATTEMPTING TO EXPAND TAX IMMUNITY OF GOVERNMENT CONTRACTORS BEYOND THAT INTENDED BY THE JUDICIAL, LEGISLATIVE AND EXECUTIVE BRANCHES OF GOVERNMENT THROUGH USE OF THE "AGENCY" DEVICE

California submits that the King & Boozer, Kern-Limerick, Inc., Livingston and Boyd decisions of this Court show that federal tax immunity should not lightly be extended to government contractors as "agents" of the United States. (See discussion under heading V in New Mexico brief.) This Court should rule that federal immunity is not extended to dealings by independent

contractors except where the United States clearly acts as a true disclosed principal which assumes all the normal duties and responsibilities of a true principal for purposes other than creating tax exemption and the private contractor is clearly acting as an agent for disclosed principal (USA).

"Magic words" merely stating that the contractor acts as agent not accompanied by the clear substantive assumption by the United States of the responsibilities of a principal do not an "agency" make.

Congress clearly has intended to preclude federal employees from immunizing private contractors from state taxes by use of magic words of agency.

In 1939 Congress authorized the Navy to enter into cost plus fixed fee contracts (53 Stats. 590, § 4(a)).

House Bill No. 8438, 76th Congress, Third Session as it came from the Senate to the House of Representatives provided that:

> " . . . all contractors who enter into contracts under the authority contained in this paragraph shall, in the discretion of the Secretary of the Navy, be held to be agents of the United States for the purposes of such contracts and all purchases under such contracts shall be exempt from Federal, State and local taxes."
>
> (86 Cong. Rec. 11401.)

There followed a proposed amendment, debate and elimination of the above quoted "exemption through agency" language. (86 Cong. Rec. 11401-04 [H.R.], 11675 [Senate].)

Continued Congressional intent to prevent private contractors from enjoying a tax immunity is shown by its repeal of 9(b) of the Atomic Energy Act effective October 1, 1953, following

judicial reliance thereon in 1952 (Carson v. Roane-Anderson Co. (1952) 342 U.S. 232) as a basis for immunizing an Atomic Energy Commission contractor from state taxes. (See discussion at page 19 of United States v. Livingston (E.D. S.C. 1959) 179 F.Supp. 9, affd. per curiam 364 U.S. 281.)

About 1954 attempts to immunize corporations doing business with the Navy as "agents" of the United states again came to the attention of Congress. On January 28, 1955[1/] an Assistant Secretary of Defense wrote to a member of Congress, Rowland Hughes,"

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1. This letter is in evidence in United States of America v. State Board of Equalization (U.S.D.C Central Dist. Cal.) Civ. No. 79-02652-R as an attachment to a "Supplemental Declaration. . .," filed March 4, 1980, therein (and appearing at page 191 of "Excerpts of Record" on the appeal therein to the 9th Circuit Court of Appeals No. 80-5391.

"In response to an informal request from your office, we wrote you on May 18, 1954 concerning the designation of contractors as agents of the Government for the purpose of making purchases for Government use. Senator Gore had written Mr. Dodge on March 1, 1954 inquiring as to the extent such procedures; as exemplified in Kern-Limerick-Inc. v. Scurlock (347 U. S. 110, 1954), constituted general policy.

"Our letter advised that the only instances in which a contractor had been constituted as an agent for the Government for the purpose of making purchases and to pledge the credit of the Government therefor, were limited to some cost-plus-a-fixed-fee construction contracts of the Navy. Report was also made of the fact that neither the Army nor the Air Force used the device and that the Navy made no use of it in any other type of contract, including firm fixed-price construction contracts.

"We also indicated that whether use of the purchase-agent device would be extended or continued was being studied by a committee composed of representatives of the military departments as well as the

> Office of the Secretary of Defense. In accordance with our commitment to provide you with the results of that study, we wish to advise that this study has now been completed. It has been determined that it will be the policy of the Department of Defense not to designate prime contractors on cost-type contracts to be performed within the continental limits of the United States, as agents of the Government for the purchase of supplies."

Hearings were thereafter held wherein this policy was reiterated. (See Hearings Before A Subcommittee of The Com. on Gov. Operations United States Senate, 85th Cong., 1st Sess. on S. 6, held June 11 and 12, 1957, pp. 75-78 wherein counsel for the Air Force accompanied by counsel for Department of Defense stated:

> "The Department of Defense has established a firm policy against designating contractors on contracts to be performed within the United States as agents of the Government for the purchase of

> supplies and with the right to pledge the credit of the Government in order to avoid the imposition of taxes."

In apparent reliance on "self-policing" of this nature Congress refrained from passing legislation.

As further evidence of Congress' desire to narrow (rather than broaden) tax immunity of private corporations performing functions for the United States Government, it amended 12 U.S.C. 548 in 1969 (Pub.L. 91-156) to initiate elimination of immunity of national banks from non-discriminatory state taxation.

Action has been taken at the top levels of the Executive branch to narrow claims of tax immunity through "agency." General Services Administration (hereinafter sometimes "GSA") amended its supply schedule

contract regulations about 1969 to eliminate "agency" type language.[2/] The Department of Defense, which established its non-agency policy in 1955 (discussed above), similarly amended its Armed Services Procurement Regulations (ASPR) in 1977 (32 C.F.R. § 5.900 to 5.907).

The need for this Court to clearly and narrowly define the situations in which private contractors as "agents" of the United States can avoid paying state taxes is emphasized by the aggressive efforts in litigation of attorneys for the United States in attempting to extend tax immunity of

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2. "You are hereby authorized to act for the Government. . ." and "This order is placed in behalf of [insert name of department]" were replaced by "This order is placed pursuant to written authorization from [naming government department]" (41 C.F.R. § 1-5.900 to 1-5.905.)

private contractors contrary to the above-described intention to narrow such immunity.

In the early 1970's, without revealing the Department of Defense policy against agency or the 1969 GSA supply schedule regulation amendment, attorneys for the United States of America sought in court immunity from state taxation regarding pre-1973 leases by Department of Defense contractors and pursuant to GSA supply schedules, among others. (U.S.A. v. S.B.E. U.S.D.C., Central Dist. Cal. 72-2568-R.) Thereafter, California became aware of the Department of Defense policy. In United States of America v. State Board of Equalization (dealing with years 1973-76) now pending before the 9th Circuit No. 80-5391, the United States asserts that in spite of the clear

Department of Defense policy not to make its contractors agents, the wording in its ASPR regulation (quoted in footnote 2 above) "in behalf of" and "for" (which were not deleted until 1977) created a tax immune "agency."

In a later federal case (dealing with 1979-present) United States of America v. California State Board of Equalization Civ. No. 79-03359-R (Central District, California) attorneys for the United States are asking the court to declare as a general rule of law that

> "leases of tangible personal property made pursuant to General Services Administration (GSA) supply schedule contracts by contractors having cost-reimbursable contracts with the United States and having been authorized by the United States to use GSA supply schedule contracts were leases made by the contractor as agent of the United States for procurement purposes and, as such, were leases to the United States and

> were not subject to the California sales tax.",

even though the applicable GSA regulations (41 C.F.R. § 1-5.900 to 1-5.905) were amended in 1969 to remove the only language which suggested agency was created when government contractors are authorized to use GSA contracts.

It thus appears that while Congress, the regulations and policies of executive departments, and the rulings of this Court mandate that extension of constitutional immunity to private contractors as agents of the United States be narrowly limited, attorneys for the United States in litigation are attempting to expand such immunity to and beyond the point where mere "magic words" like "in behalf of" or "as agent for" will create immunity even though there is not in substance a true principal-agency

relationship created for legitimate purposes except to establish tax immunity.

Here magic words of "agency" were apparently inserted into contracts by employees in New Mexico two years after this litigation began, with no apparent purpose except to create tax immunity. (See discussion in New Mexico Brief, heading III). Such actions should be held to be ineffective in avoiding taxes.

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CONCLUSION

The opinion of this Court should make it clear that government contractors cannot be immunized from state taxes by a federal department merely stating in a contract that the contractor is authorized to act "in behalf of" or "for" a government department or merely to use GSA supply schedule contracts. The Court should make it clear that only where the United States clearly has complete control of and responsibility for actions of the alleged "agent" and the actions of the alleged agent are clearly those of the United States as principal, can the acts of the alleged agent be immune from state taxation as acts of the United States. The tax immunity of the United states should not apply to acts of any private company

which acts in its own name or otherwise acts independently.

Here, notwithstanding the "magic words" and "advance funding" the alleged agents were not true agents. They had no authority to bind the United States. They are not immune from tax.

Even should the Court find sufficient evidence here that the United States was fully bound as principal under the transactions in issue, that the agents performed no independent acts which were taxable and therefore no tax is payable, the Court should in its opinion make it clear that immunity cannot be created by "magic words" of agency and

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only where in substance the United States is fully bound as the true principal can state taxes be avoided.

Respectfully submitted,

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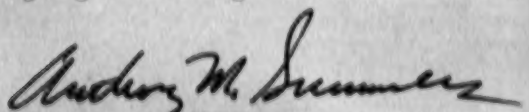

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I, the undersigned say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within-mentioned mailing occurred, and not a party to the subject cause; my business address is 110 West A Street, Suite 700, San Diego, California 92101.

I served a copy of the BRIEF ON BEHALF OF STATE OF CALIFORNIA AS AMICUS CURIAE FOR THE STATE OF NEW MEXICO on each of the following, by placing same in envelopes addressed as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on July 10, 1981.

There is a delivery service by United States mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed on July 10, 1981, at San Diego, California.

Carolyn C. Yada
CAROLYN C. YADA

Subscribed and sworn to
before me this 10TH day of
July, 1981.

Sandra Zweig
Notary Public in and for said
County and State

OFFICIAL SEAL
SANDRA ZWEIG
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires February 26, 1983